IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO. 213 OF 1995

Bharat Bhagwan Tambe,
Age 25 years, R/o. Gulwanchi,
Tal. North Solapur,
Dist Solapur ...Appellant.

Versus

The State of Maharashtra ...Respondent

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Shri. T.E. Mane, Advocate for the appellant.

Shri. A.S. Shitole, A.P.P. for Respondent.

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CORAM: SMT. V.K. TAHILRAMANI, J.

DATED: 29TH SEPTEMBER, 2004

ORAL JUDGMENT:-

1. Through this appeal, the appellant challenges the judgment and order dated 27.4.1995 passed by the learned Additional Sessions Judge, Solapur in Sessions Case No.138 of 1993. By the said judgment and order, the appellant came to be convicted under Sections 363 and 366 of I.P.C. For the offence under Section 363 of I.P.C. the appellant came to be sentenced to R.I. for three years and to pay fine of Rs.500/- i/d R.I. for two months. For the offence under Section 366 of I.P.C. the appellant came to be sentenced to R.I. for five years and to pay fine of Rs.500/- i/d R.I. for two months. The learned Sessions Judge has directed that both the

substantive sentences shall run concurrently.

2. The prosecution case briefly stated is as under:-

. P.W.4 Muktabai is the younger sister of P.W.1 Gorakh Chavan. Muktabai was residing with her brother P.W.1 Gorakh Chavan at village Gulwanchi. At the time of incident Muktabai had passed 10th Std. and was unmarried. On 19.11.92 at about 7.30 p.m. P.W.1 Gorakh returned home from his work, he did not find Muktabai at home, therefore, he made enquiries with his mother. His mother informed him that Muktabai left the house on the same day at about 12.00 noon stating that she is going to her elder sister Umabai and thereafter to the hospital. Muktabai did not return back for two days, therefore, P.W.1 Gorakh made enquiries with his sister Umabai at Solapur. Umabai informed him that Muktabai did not come to her house at all. Thereafter, Gorakh made enquiries with his relatives but Muktabai could not be traced. Therefore, on 25.11.92 Gorakh has lodged his report in the police station regarding Muktabai being missing. Thereafter, Gorakh learnt that the appellant was also not in the village. He learnt that Nandkumar, brother of accused brought P.W.4 Muktabai and the appellant from Nagpur to Solapur.

After about 15 days Gorakh lodged his complaint (Exh.6) with the police. The appellant came to be arrested. Thereafter, after completion of investigation charge sheet came to be filed.

3. In due course, the case was committed to the Court of Sessions. Charge came to be framed against the appellant under Section 363 and 366 of I.P.C. The appellant pleaded not guilty of the said charges and claimed to be tried. However, after P.W.4 Muktabai came to be examined, an additional charge came to be framed against the appellant under Section 376 of I.P.C. Appellant pleaded not guilty to the said charge. The defence of the appellant is that of total denial. On behalf of the appellant-accused one defence witness i.e. handwriting expert Firoz Shaikh came to be examined. After going through the evidence of all witnesses, the learned Sessions Judge acquitted the appellant under Section 376 of I.P.C. however, the learned Sessions Judge convicted the appellant under sections 363 and 366 of I.P.C. Hence, this appeal.

4. I have heard Shri. T.E. Mane, the learned advocate for the appellant and Mr. A.S. Shitole, the learned A.P.P. for the State. I have also perused the entire material on record. After

utmost circumspection, I have reached the conclusion that this appeal deserves to be allowed.

5. The evidence on which the conviction of the appellant is founded is as under:-

i) The evidence of prosecutrix Muktabai Chavan.

ii) The evidence of the brother of prosecutrix Gorakh Chavan.

iii) The evidence of P.W.2 Bhimashankar Maradkar in relation to the date of birth of Muktabai.

. For the reasons stated hereinafter, in my view, the evidence of none of these witnesses can be relied upon.

6. I would first like to take up the evidence of P.W.1 Gorakh Chavan, his evidence is not of much use to the prosecution. Thereafter, I shall deal with the evidence of prosecutrix Muktabai Chavan. P.W.4 Muktabai Chavan has stated that the appellant used to visit her house. The appellant kidnapped

her from her house to Solapur and then to Nagpur. In Nagpur they resided in a rented house for about one month. Thereafter, the elder brother of the appellant came there and brought the appellant and Muktabai to Taluka Police station at Solapur. The appellant was saying that he would marry her. Muktabai has stated that the appellant gave threats of killing her family members if she failed to accompany him. The prosecutrix has further stated that the appellant committed rape on her against her will at Nagpur. It was on the basis of these averments in the evidence before the Court by the prosecutrix, an additional charge under Section 376 of I.P.C. came to be framed against the appellant. However, it is to be noted that in her statement during the investigation the prosecutrix has not stated anything about the appellant committing rape on her. Based on this and the other circumstances, in this case the learned Sessions Judge has acquitted the appellant under Section 376 of I.P.C. It may be stated here that the averment of the prosecutrix that the appellant gave threats of killing her family members if she failed to accompany him to Solapur and then to Nagpur is also an omission. Muktabai has admitted that she did not state before the police at the time of recording of her statement that the appellant kidnapped her. She has also admitted that she did

not state before the police that the appellant insisted her to accompany him and he will marry her or else he will kill her brothers. It is also admitted by Muktabai that she did not state before the police that the appellant committed rape on her against her will at Nagpur. The prosecutrix has admitted that for the first time she has deposed before the court that appellant kidnapped her and gave her threats to kill her brothers and also committed rape on her many times at Nagpur. Thus, if this improvement is excluded from consideration there is no material to show that the prosecutrix was induced in any manner to accompany the appellant to Solapur and then to Nagpur or that the appellant had forcibly carried away the prosecutrix to Solapur and then to Nagpur. On the facts and circumstances of the present case which have been brought on record, it clearly appears that there was love affair between Muktabai and the appellant. In fact the prosecutrix had admitted in para 6 of her evidence that "It is true that I was having love affair but it was not known to my family members." It appears that on account of this affair she left her house of her own accord.

7. In the present case there are 23 photographs which are on record. Muktabai has admitted that her photographs were taken with the appellant in

various poses at Nagpur. On going through the said 23 photographs, it is seen that the photographs have been taken at various different places. The said places are places like temples and gardens. On perusal of the photographs it is seen that the prosecutrix is in a free state of mind, she does not appear to be under any threat or pressure or tension. These photographs clearly bear out that there was love affair between Muktabai and the appellant. As stated earlier, Muktabai has admitted that she was having love affair but it was not known to her family members. It appears that Muktabai was under pressure from her brother to deny her love affair. This is borne out from her evidence where she has stated that "It is true that my brothers were saying that, our family will be defamed if my marriage was solemnised with the accused." She has also admitted that the accused was educated upto only 4th Standard whereas she had studied upto S.S.C. Moreover, she belonged to Maratha caste whereas the accused belonged to Dhangar caste, which is a much lower caste. Thus, it appears on account of her brothers she has denied her love affair.

8. In the present case, it is the case of the appellant that the prosecutrix was in love with him and she had written a large number of love letters

to the appellant. In these letters, the prosecutrix has instigated the appellant to take her away with him. As stated earlier the defence witness D.W. 1 Firoz Shaikh who is a hand writing expert was examined by the defence. Hand writing expert D.W.1 Firoz Shaikh has examined various documents i.e. the letters written by Muktabai as well as the admitted handwriting of Muktabai. In his opinion, the letters had been written by Muktabai. Nothing has been brought out in the cross examination of this witness so as to disbelieve his testimony.

9. A perusal of these letters show that;-

. In the first letter Muktabai has stated that even if her age is 17 years they would run away. Before running away the appellant should find a job for himself. Even after children are born they would not return back to their village. She has also asked the appellant to find a job for her. She has further stated that she has extremely afraid of her family members and that the appellant has to take care of her. She has further stated to the appellant that the appellant need not worry about the police and the court and she would take care of such matters.

. In the second letter prosecutrix Muktabai addressed the appellant as "Priya Bharat". Thereafter, she has informed him that on the coming Saturday her brother and sister-in-law would be coming home for eight days in order to fix her marriage. She has further stated that it is absolutely imperative that both of them need to go away as they are.

. In the third letter Muktabai has stated that she would go to a particular place i.e. to the house of her aunt and if the appellant does not come on that day she would die on that day. She has further written that she is unable to express her mental status through words while writing the letter.

10. There are also other letters on record written by Muktabai, from all these letters, it is clear that the prosecutrix was in love with the appellant. It was she who instigated the appellant to take her away. From the evidence which has come on record it is clear that the appellant did not give any threat or use any force mental or physical to take Muktabai away from the house of her brother. Thus, the prosecutrix had willingly left the house of her brother of her own accord without any inducement by the appellant.

11. Shri. Shitole, the learned A.P.P. has submitted that even assuming that the prosecutrix went away with the appellant as she was in love with him and no force or threats can be said to have been given by the appellant, yet the appellant would be guilty of the offence under Sections 363 and 366 of I.P.C. as the prosecutrix was below 18 years of age at that time i.e. in November 1992. He has placed reliance on the evidence of P.W.2 Bhimashankar Maradkar to show that the prosecutrix was below 18 years of age. P.W.2 Bhimashankar Maradkar was working as the Head Master in the Zilla Parishad School at Gulwanchi since 2.9.1991. He has stated that Muktabai was admitted in the school on 7.7.1981 and she left the school on 6.6.1988. As per the school record the date of birth of Muktabai is 1.6.1976. He has produced a copy of school leaving certificate (Exh.11) which also shows the date of birth of Muktabai to be 1.6.1976. Muktabai has also stated that her date of birth is 1.6.1976 that means on the date of the offence her age would be about sixteen and half years. Thus, no doubt means that she was below 18 years of age. However, it is pertinent to note that Muktabai was living in village and P.W.2 Bhimashankar Maradkar, the Head Master of the school in which Muktabai had studied, has

specifically stated that at the time of admission in the school in the villages, generally the date of birth is given as First June. Bhimashankar Maradkar has further stated that as per the rules if the parents of the students do not remember the month of birth of the students, then it should be taken as June and if they do not remember the date then it would be taken as first of the month. He has further admitted that in the school register entries from Sr. No. 26 to Sr. No. 212 showed the date of birth as first of June. From this it appears that the dates in the school register were not the actual dates of birth of the student but they were put as per convenience. Looking to these facts it cannot be conclusively said that the date of birth of Muktabai was 1.6.1976.

12. From the evidence on record it is clear that Muktabai went with the appellant of her own accord without any threat being administered to her or on account of any inducement on the part of the appellant. It is further clear that she went with the appellant as she was in love with him and she wanted to go away with him as her marriage was being fixed with someone else. Muktabai had willingly left the house of her parents on her own accord. From the facts on record it is clear that Muktabai had sufficient understanding and she

voluntarily and willingly left the house of her parents. Letters written by Muktabai to the appellant clearly bear out this fact. In the present case it cannot be said that the appellant had taken Muktabai out of lawful guardianship.

13. In any case assuming that Muktabai was below 18 years of age, it would be advantageous to quote the observations of the Supreme Court in the case of **S. Varadarajan Vs. State of Madras reported in AIR 1965 SC 942**. In the said case, the facts were similar, the girl was below the age of majority. In the said case also the evidence on record left no doubt that the insistence of marriage came from the girl's side. In the said case it was held that the appellant by complying with her wishes can by no stretch of imagination be said to have taken her out of the keeping of her lawful guardianship. In the said case it was further observed that:-

> " There is no suggestion in Savitri's evidence, who, it may be mentioned had attained the age of discretion and was on the verge of attaining majority that she was made by the appellant to accompany him by administering any threat to her or by any blandishments. The fact of her accompanying the appellant all along is

> quite consistent with Savitri's own desire to be the wife of the appellant in which the desire of accompanying him wherever he went was of course implicit. In these circumstances we find nothing from which an inference could be drawn that the appellant had been guilty of taking away Savitri out of the keeping of her father. She willingly accompanied him and the law did not cast upon him the duty of taking her back to her father's house or even of telling her not to accompany him. She was not a child of tender years who was unable to think for herself but, as already stated, was on the verge of attaining majority and was capable of knowing what was good and what was bad for her."

. In the said case it was further observed that the girl whom the accused were charged with having kidnapped was desperately anxious to leave her house and even threatened to commit suicide if she was not taken away from there.

. In the said case it was further observed that:-

> "We would limit ourselves to a case like the present where the minor alleged to have

> been taken by the accused person left her father's protection knowing and having capacity to know the full import of what she was doing voluntarily joins the accused person. In such a case we do not think that the accused can be said to have taken her away from the keeping of her lawful guardian. Something more has to be shown in a case of this kind and that is some kind of inducement held out by the accused person or an active participation by him in the formation of the intention of the minor to leave the house of the guardian."

. In the said case the Supreme Court held that no offence under Section 363 of I.P.C. has been established and, therefore, the accused was entitled to acquittal. The facts in the present case and the case of S. Varadarajan (supra) are similar. Looking to the evidence on record in this case the conviction of the appellant under Section 363 as well as 366 of I.P.C. deserves to be set aside.

14. In the result this appeal is allowed. The conviction and sentence of the appellant as imposed by the learned additional Sessions Judge, Solapur

by the judgment and order dated 27.4.1995 in Sessions Case No. 138 of 1993 is set aside. The appellant is acquitted therein. Fine amount if any paid by the appellant, be refunded to the appellant. The appellant is on bail, his bail bond shall stand cancelled.